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Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 160.

CHARLES A. TINKER,
Plaintiff in Error,
against
FREDERICK L. COLWELL,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Brief on Behalf of Defendant in Error.

THOMAS McADAM,
GEO. NEWELL HAMLIN,
Counsel for Defendant in Error.

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Supreme Court of the United States,

OCTOBER TERM, 1903.

No. 160.

CHARLES A. TINKER,
Plaintiff in Error,

AGAINST

FREDERICK L. COLWELL,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Statement of Facts.

On the application of the plaintiff in error for his discharge in bankruptcy in the United States District Court for the Southern District of New York, the jurisdiction of that Court and the right of the plaintiff in error to his discharge, was questioned by appropriate specifications of objections by the defendant in error and exceptions were filed thereto by the plaintiff in error.

The specifications of objections were overruled, and the plaintiff in error granted his discharge (fols. 8–11), but only, as the order granting the discharge shows, "from all debts and claims which are made provable by the bankrupt acts against his estate, and which existed on the 13th day of September, A. D. 1899, on which day the petition for adjudication was filed by him, excepting such debts as are excepted from the operation of a discharge in bankruptcy" (fols. 11, 12).

The opinion of Mr. Justice BROWN, reported in 99 Federal Reporter, at page 79, rendered upon his decision as to the effect of the said exceptions, also shows that the question as to whether the judgment—the subject matter of this discussion—was discharged or not, was left undetermined. Allusion to this opinion will be hereafter made.

Section 1268 of the New York Code of Civil Procedure provides, among other things, as follows:

> "*At any time* after one year has elapsed since a bankrupt was discharged from his debts * * * he may apply, upon proof of his discharge, to the Court in which judgment was rendered against him * * * for an order directing the judgment to be cancelled and discharged of record. *If it appears upon the hearing that he has been discharged from the payment of that judgment*, or the *debt* upon which *such judgment* was recovered, an order must be made directing said judgment to be cancelled of record. * * *"

Under this provision, the plaintiff in error applied to the Special Term of the New York Supreme Court for an order cancelling of record a judgment entered in the said New York Supreme Court against him in favor of Frederick L. Colwell, the defendant in error, for $50,653.98 damages and costs in an action which the petition in this proceeding avers simply is for *criminal conversation with said Colwell's wife* (fols. 3–6).

The Court at Special Term denied the application for the reason, as was stated by Mr. Justice GILDERSLEEVE in his opinion, *that the said judgment* was not affected by the discharge in bankruptcy of the plaintiff in error, inasmuch as the action in which it was recovered was necessarily founded upon willful and malicious injuries to the person or property of another, and therefore excepted from the operation of the discharge under Section 17, subdivision 2 of the Bankruptcy Act (fols. 19–20).

The order of the Special Term denying the application to cancel the judgment of record was on appeal duly affirmed by the Appellate Division, First Department, of the New York Supreme Court, by a unanimous Court; but with leave to the plaintiff in error to renew his application upon such additional papers as he may be advised (fol. 22), the Appellate Division, in a *per curiam* opinion, refusing to pass upon the question as to whether or not malice was involved in the acts upon which the judgment was rendered until the judgment record should be produced (fol. 28).

On appeal to the Court of Appeals of the State of New York, the order of the Appellate Division was affirmed by a unanimous Court (fol. 31), upon the distinct ground that a judgment for criminal conversation is for an injury to the person and property of the husband, which is willful and malicious, and that, therefore, the discharge in bankruptcy of the plaintiff in error does not operate to free him from the debt evidenced by the judgment here involved.

POINT I.

Within the meaning of the Bankruptcy Act, Section 17, Subdivision 2, the judgment in the action sought to be cancelled is a judgment in an action for "injuries to the person or property of the judgment creditor."

This section of the Bankruptcy Act, as it existed at the time of the application of plaintiff in error, provided that a discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as are

> "Judgments in actions for frauds or obtaining property by false pretences or false representations *or for willful and malicious injuries to the person or property of another.*"

It has been said that each one of the cases enumerated in this subdivision of Section 17 of the Bankruptcy Act is exactly the same in meaning; that is to say, that they all involve a willful or intentional injury to the person or property. Under the legal definition of "willful and malicious" the provision as to fraud and false representation might very well have been left out, unless it were sought to provide for a judgment obtained in an action upon contract in which fraud or false representation were charged in the creation of the contract obligation, because where fraud or false representation are asserted in an action sounding in tort, it must be an action for injury to the property. It is enough to quote from the case mentioned:

> "The word fraud means *moral turpitude or intentional wrong*, and part of the purpose of the statute was to *discourage and punish such moral turpitude and intentional wrong.*" * * *
>
> "The statute, besides specifying judgments in

actions for fraud, also enumerates, in the disjunctive, judgment *for willful and malicious injuries to the person or property of another*, or by obtaining property by false representations."

"*The meaning in each one of the cases thus enumerated and following each other is exactly the same*, and means a judgment based on a right or injury growing out of the fraud, false pretense, false representations or willful and malicious injuries to the person or property of another."

In re Blumberg, 1 Am. Bankt. Rep., 634.

All torts or wrongs which in their nature involve willfulness and malice were meant to be included in the phrase—actions "for willful and malicious injuries to t person or property of another."

The word "injury" as here used can only mean the invasion of a legal *right* of another; in other words, a wrong done to a person in violation of his *right;* and such is its common interpretation.

Parker vs. Griswold, 17 Conn., 302.
Wrightman vs. Devere, 33 Wisc., 575.
Penn. R. Co. vs. Marchant, 119 Pa. St., 561.
Northern R. Co. vs. Carpentier, 13 How. Pr. (N. Y.), 222.
Woodruff vs. North Bloomfield Grav. Men. Co., 18 Fed., 781.

Under the general interpretation of the word "injury," it means any legal wrong which will give a cause of action for damages to the one whose *rights*, person or property are injured thereby.

Cases cited, *supra.*

The word "injury" is of broader significance than the expression "defraud." Thus, in actions for fraud or obtaining property under false pretences, the act complained of is one which is of benefit to the party sought to be charged, but, frequently, in the ordinary action for a tort, the wrong committed is one which does not in any way, pecuniarily or otherwise, benefit the party sought to be charged. Thus, it has

been held that the phrase "with intent to injure or defraud" is not to be limited in its interpretation to a malicious dealing with property for the personal advantage of the wrongdoer, but that the word "injure" is of a broader application and was doubtless inserted in the phrase to cover cases of misapplication causing injury, without benefit to the offender.

U. S. vs. Taintor, 11 Blatchf., 378.
U. S. vs. Harper, 33 Fed., 471.

Nor can it be successfully maintained that the phrase—"injuries to the person or property"—in any way limit the full scope and interpretation of the word "injury."

Injuries or wrongs giving causes of action for damages, have from time immemorial been distributed into these two great classes for the purpose of designating the character of the wrongs. On the one hand, injury to the property of another means an unlawful invasion of *any right* of property possessed by that other, and injury to the person, an unlawful invasion of any *personal right* of another.

Rights of persons are classified as absolute and relative and these will include all personal rights for the violation of which, the law grants a remedy. As was said in the case of Delamater vs. Russell, 4 How. Pr. (N. Y.), 234.

> "Rights of persons are divided into absolute and relative. Criminal conversation is classed under actions for injuries to the latter (1 Ch. Pl., 137). This classification is related by all our elementary writers" (2 Kents Com., 129; 3 Black. Con., 138).

As stated by Blackstone:

> "Rights of persons, we may remember, were distributed into absolute and relative, absolute which were such as appertained to and belonged to private men merely as individuals or single per-

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sons, and relative which were incident to them as members of society, and connected to each other by various ties and relations, and the absolute rights of each individual were defined to be the right of personal security, the right of personal liberty and the right of private property, so that the wrong or injuries affecting them must, consequently, be of a corresponding nature."

Blackstone, Book III., pp. 118, 119.
1 Chit. Pl., 137, 1 Kent, 587 (11th ed.).
3 Black. Com., 139.

Therefore, it follows that if criminal conversation be not an injury to property, it is an invasion either of an absolute personal right or of a relative personal right. If it be an invasion of an absolute personal right, then there can be no question but that it is "injury to the person" within the narrowest meaning of that term. But being also an invasion of a relative personal right, it also is an injury to the person because an injury to the person is merely an invasion of any and all personal rights.

Authority is not wanting for this conclusion.

It has been held that, under a statute conferring jurisdiction in actions for *injuries* to persons, the words "*injuries* to persons" included *injuries* to the relative rights of persons as well as *injuries* to their absolute rights. The Court said: "Actions for seducing wives, daughters or servants, or for enticing away or harboring apprentices or servants, are said to be for *injuries* to the relative rights of persons; and we are inclined to think a justice has jurisdiction of any such actions where the damages claimed do not exceed two hundred dollars."

Wightman vs. Devere, 33 Wis., 575.

Criminal conversation at common law is an injury to the husband, entitling him to damages.

"The essential injury to the husband consists in the defilement of the marriage bed in the invasion

of his exclusive right to marital intercourse with his wife, and to beget his own children."

3 Blackstone Com., 139.

At common law, an action in trespass *vi et armis* was the usual form of remedy by a husband for the seduction of his wife, for the reason that a wife could not give her consent, and force was in consequence implied.

Woodward vs. Walton, 2 B. & P., N. N., 476.
Guy vs. Livesey, Cro. Jac., 501.
Parker vs. Bailey, 4 D. & R., 215.
16 E. C. L., 195: 1 Saunders on Pleading and Ev. (5th Am. Ed.), 875.

And it is the modern rule that force will be implied. The wife cannot, even by her conset, relieve the act of this implication.

Bedan vs. Turney, 99 Cal., 649.
Wales vs. Miner, 89 Ind., 118.
Moore vs. Hammoris, 119 Ind., 510.
Jacobson vs. Siddal, 12 Oregon, 280.

Trespass *vi et armis*, is the form of action which lies to recover damages for an injury which is the immediate consequence of a forcible wrongful act done to the person or personal property.

Bouvier Law Dict., Vol. 2, p. 748.

And so it has been frequently held that criminal conversation is a *personal injury* or wrong to the husband, an invasion of his rights.

Delamater vs. Russell, 4 How. Pr., 234.
Strauss vs. Schwarzwallder, 4 Bas., 627.
Bedan vs. Turney, 99 Cal., 653.
1 Selw. *Nisi Prius* (13th Ed.), 7.
Rigant vs. Gallisard, 7 Mod., 81; 2 Salk., 552.
Birt vs. Barlow, 1 Doug., 171.

But in another aspect of the injury done by criminal conversation to the husband, it consists in an invasion

of his property rights. For the husband is entitled to the services of his wife and this is a right of property.

Cregin vs. Railroad, 75 N. Y., 192; 83 N. Y., 595.
Groth vs. Washburn, 34 Hun (N. Y.), 509.

And criminal conversation, inasmuch at it tends to deprive the husband of the wife's services to himself or in the bearing and proper nurture of and example to his children, is an injury to that right.

Lundt vs. Hartrunft, 41 Ill., 9.
Colwell vs. Tinker, 169 N. Y., 531.

This section of the bankruptcy law, which is now brought to this Court for construction, has been more than once construed and the Courts have been uniform in holding that it expressly excepts from a bankrupt's discharge, judgments in actions for violations of personal rights, which are relative in their nature.

Thus, judgments for damages for the alienation of a wife's affections are not barred by a discharge in bankruptcy.

Leicester vs. Hoadley, 71 Pac. R., 318.
Erline vs. Sargent, 23 Ohio Cir. Ct. Rep. 180.

And judgments for the seduction of a daughter have been held not barred.

In re Freche, 109 Fed., 620.
In re Maples, 105 Fed., 919.

By analogy to these cases and by direct authority, a judgment for criminal conversation is an injury to person and property and so within the meaning of these words in the section of the bankruptcy act here in question.

POINT II.

Criminal conversation is a malicious and willful injury.

Mr. Justice KIRKPATRICK (*In re* Freche, Vol. 6, p. 479, Am. B. R.), in a proceeding to have a father's judgment for damages for the seduction of his daughter declared inoperative by reason of a discharge in bankruptcy, refused such relief, and, among other things, said:

> "From the nature of the case, the act of the defendant which caused the injury was *willful*, because it was *voluntary*. The act was unlawful, wrongful and tortious, and, being willfully done, it was, in law, malicious. It was malicious, because the injurious consequences which followed the wrongful act were those which might naturally be expected to result from it, and which the defendant must be presumed to have had in mind when he committed the offense. 'Malice,' in law, simply means *a depraved inclination on the part of a person to disregard the rights of others*, which intent is manifested by his injurious acts. *While it may be true that, in his unlawful act, the defendant was not actuated by hatred or revenge or passion* towards the plaintiff, nevertheless, if he acted wantonly against what any man of reasonable intelligence must have known to be contrary to his duty, and purposely prejudicial and injurious to another, the law will imply malice."

See, also,

In re Maples, 105 Fed., 919, p. 430.
Bigelow on Torts, p. 12.

As defined by Judge BROWN in the case of United States vs. Reed, 86 Fed. Rep., 309:

> "Malice consists in one's unlawful doing of an act, or willful neglect of a known obligation, which

he knows is liable to injure another, regardless of the consequences, and a malignant spirit or a specific intention to hurt a particular individual is not an essential element."

A "malicious" injury has been defined to be "an injury committed wantonly, willfully or without cause." 2 Burill's Law Dic., 175.

> "The intentional doing of a wrongful act with knowledge of its character and without cause or excuse is malicious."
>
> Commonwealth vs. York, 9 Metc., 93, 104.
> Wiggins vs. Coffin, 3 Story, 1.
> Etchberry vs. Levielle, 2 Hilt. (N. Y.), 40.
> Rounds vs. Delaware, etc., R. Co., 3 Hun, (N. Y.), 335.

In Bromage vs. Prosser (4 Barn and Cress., 247) BAYLEY, J., said:

> "Malice in common acceptation means ill will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse. If I give a perfect stranger a blow likely to produce death, I do it of malice, because I do it intentionally and without just cause or excuse. If I maim cattle without knowing whose they are; if I poison a fishery without knowing the owner, I do it of malice, because it is a wrongful act, and done intentionally. If I am arraigned of felony, and willfully stand mute, I am said to do it of malice, because it is intentional and without just cause or excuse. * * * And if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional."

This definition of malice as laid down in Bromage vs. Prosser, is the one which is universally followed

and adopted by all Courts. In the legal acceptation of the term "malice," actual malevolence or ill will need not exist. In this respect, it has also been said:

> "In a legal sense, any act done willfully and purposely to the prejudice and injury of another, which is unlawful, is, as against that person, malicious. It is not necessary to render an act malicious, that the party be actuated by a feeling of hatred or ill will towards the individual, that he entertain and pursue any general bad purpose or design. On the contrary, he may be actuated by a general good purpose, and have a real and sincere design to bring about a reformation of manners; but if, in pursuing that design, he willfully inflicts a wrong on others, which is not warranted by law, such act is malicious."
>
> Commonwealth vs. Shelling, 16 Pick. (Mass.), 340.
>
> Wheeler vs. State, 109 Ala., 60.

In the books we find malice is mentioned as being of two classes—express malice and implied malice. Generally, it is said that implied malice is such malice as is implied in law from the attendant circumstances, but this does not mean, nor has it been held by the Courts to mean, that the malice which the law implies is a malice which is deemed to exist although it may not exist. Where malice is implied in law, the circumstances of the case are such as not to admit of any other presumption whatsoever; in other words that, from the nature of the act committed, it is unthinkable to suppose it could have been done without what the law defines to be legal and actual malice.

A decision of one of the United States Circuit Court of Appeals puts this very clearly. There it is said:

> "In many decisions it is laid down as a settled rule that malice is essential to a recovery in an

action of libel, but that it is conclusively implied, from the unprivileged publication of a false charge which is libellous in itself. This is indeed a settled rule of law and it is obviously a correct statement where 'malice' means, that kind of malice which is always inferred from 'a wrongful act, done intentionally, without justification or excuse'; for it is a truism to say that malice is the conclusive inference from such an act and that, since the publication of a false charge that is libellous *per se* is without justification or excuse, malice is implied therefrom. This declaration of the law is exactly the same, practically, for it is the more simple and more philosophical rule that malice, in the common acceptation of the term—that is to say, ill will, evil intent, bad motive—is not required to be either pleaded or proved to entitle the injured party to recover the actual damages he has sustained from the unprivileged publication of a false and libellous charge."

Times Pub. Co. vs. Carlisle, 94 Fed., 766.

And in this respect the opinion of the New York Court of Appeals is of value. There it is said :

"There is no difference in the nature or degree of the malice intended, whether it be called express or implied, when these terms are used in their most proper sense. If properly applied, they refer only to *the evidence* by which the existence of malice is established. Both alike, the one no less than the other, mean *actual malice*, malice shown by the proof to have really existed. It is called implied malice when it is inferred from the naked fact of the homicide, and express when established by other evidence."

Darry vs. People, 10 N. Y., 136.

See, also,

Wilson vs. Noonan, 35 Wisc., 352.

U. S. vs. King, 34 Fed., 302.

Again, as was said by LACOMBE, J., in the last-cited case:

> " Malice, in the old definition, is spoken of as express or implied. That, again, is a distinction which is a delusion and a snare. Practically, jurymen never deal with express malice. There is no express evidence of malice given to them. * * * A person is presumed to intend what he does. A man who performs an act which he knows will produce a particular result is, from a common experience, presumed to have anticipated that result and to have intended it."

Injuries or wrongs to the person or property of another may be for the purposes of this discussion then, separated into two classes—those which are willful and malicious and those in which there is an absence of malice. In the first case, as we have seen, if the act is intentional and wrongful and without just excuse, *actual malice* is present whether that malice be express or implied. In the second case, if the act is accidental, and not intentional although wrongful, malice is not necessarily present.

Where the act which constitutes the injury is of such a nature that it is obviously a wrong or illegal act in itself, and can only be committed intentionally and with the knowledge that it is a wrongful act, and where also, there can be no justification upon any grounds, for the commission of the act, malice as defined by the law must unavoidably constitute an element in the commission of the wrong. Where such are the facts it is impossible for the mind, to think the act is not intentional and the existence of these very facts logically and conclusively refute any assertion to the contrary on the part of the wrongdoer.

The Court of Appeals of the State of New York was irresistibly driven to this conclusion in arriving at a determination of the question which is now before this

Court. As was said by the learned Justice writing the opinion in this case :

> " If there is such a thing as malice in law, and if it is ever presumed by reason of the act committed, it would seem to be an action for criminal conversation, where a jury has awarded the injured husband damages in the sum of fifty thousand dollars. The defendant alleges this recovery in his petition upon which this proceeding is founded.
>
> " A person *voluntarily* invading and destroying the marriage relation is guilty of a willful, wanton act, and it is not necessary to prove that he was moved by hatred, revenge or passion towards the husband. The law in such a case implies malice, and the judgment that follows is both a willful and malicious injury to the person or property of another."

The entering into an illicit relation with the wife of the defendant in error could not have been other than voluntary and intentional on the part of the plaintiff in error. That it would result in an injury and wrong to those who might stand in the relation to her of parent or husband was certainly within the reasonable and probable consequences to be anticipated from the relation. The act being intentional, that result must have been within the possibilities present in the mind of the plaintiff in error, and so within his contemplation and fully within his intent. That there can be no legal excuse or justification for such relations with the wife of another, needs no argument. Hence, it follows from the mere fact of the relations existing between the wife of the defendant in error and the plaintiff in error, an intentional wrong was committed without justification or excuse and there was malice present in the commission of the wrong.

For it is immaterial whether the defendant in a case of criminal conversation has or has not knowledge that

the woman is married. When he engages in intercourse with a woman not his wife, he is bound to take notice of her domestic relations, and he voluntarily assumes the hazard of being held responsible for any injuries that may result.

Wales vs. Miner, 89 Ind., 118.
Calcraft vs. Harborough, 4 C. & P., 499, 19 E. C. L., 494.

The case falls within the examples given by BAYLEY, J., in Bromage vs. Prosser, *supra*, where he says :

> " if I maim cattle, without knowing whose they are; if I poison a fishery without knowing the owner—I do it of malice, because it is a wrongful act and done intentionally."

It follows, therefore, that criminal conversation, being a wrong to the husband and done intentionally, is a malicious injury to him, whether the existence of the husband be known or not.

That judgments in actions in the nature of criminal conversation are for malicious injuries to the person and property within the meaning of this section of the Bankruptcy Act has been held, as we have before seen, in the cases of the alienation of the affections of a wife and the seduction of a daughter.

Leicester vs. Hoadley, 71 Pac. Rep., 318.
Evline vs. Sargent, 23 Ohio Cir. Ct. Rep., 180.
In re Freche, 109 Fed., 620.
In re Maples, 105 Fed., 919.

And the injury being malicious is also willful, because malice implies willfulness.

State vs. Robbins, 66 Maine, 324.
Funderburk vs. State, 75 Miss., 20.

It is said that

> " Willful is a word of familiar use in every branch of law, and although in some branches of

law it may have a special meaning, it generally, as used in courts of law, implies nothing blameable but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent."

Rounds vs. Delaware, etc., R. Co., 3 Hun (N. Y.), 335; affd. 64 N. Y., 129.
State vs. Clark, 29 N. J. L., 98.
Highway Commissioners vs. Healey, 54 Mich., 181.
Newell vs. Whitingham, 58 Vt., 341.
Chapman vs. Commonwealth, 5 Whart. (Pa.), 429.

And it has been said:

"It is said by defendant's counsel that the word willful implies the idea of malice of a mild kind and even intent without excuse. Such may be its meaning in indictments and criminal statutes but it is not to be so understood here. The word means 'obstinate, stubbornly, with design; with a set purpose,' and this definition must be applied to it where it occurs in the statute under consideration."

Fuller vs. Chicago, etc., R. Co., 31 Iowa, 204.

"Willfully" means intentionally.

Bouvier, Vol. 2, 656.
Northern Railway vs. Carpentier, 13 How. Pr. (N. Y.), 22.

POINT III.

In any event the burden is on the plaintiff in error to show the lack of malice and willfulness in the acts upon which the judgment was predicated, and that the judgment was not for an injury to person or property.

Under the provisions of Section 1268 of the New York Code of Civil Procedure it was incumbent upon the plaintiff in error to show to the satisfaction of the Court in which the judgment was rendered that he had been discharged from the payment of the *particular judgment* or debt which he sought to have canceled and discharged of record, for the act provides that this fact must appear upon the hearing.

His mere statement, in his petition, "that the said judgment was not recovered against your petitioner for a willful or malicious injury to the person or property of the said Frederick L. Colwell *within the meaning of the said Acts of Congress*" (fol. 5) is a conclusion of law and not a statement of fact.

Whitton vs. Tomlinson, 160 U. S., 243.

And such an allegation cannot be deemed to be admitted by a failure to deny it.

Ritchie vs. McMullen, 159 U. S., 241.
Pullman Palace Car Co. vs. Miss. Pac. R. Co., 11 Fed., 636.
Dillon vs. Barnard, 21 Wall., 437.

The fact of the lack of malice or willfulness could have been shown, and certainly would have been shown by the then petitioner by the production by him of the judgment record and its presentation to the Court. Such was not the fact, and hence its attempted suppression.

For this very reason the Appellate Division of the

New York Supreme Court affirmed the order of the Court below and granted the plaintiff in error leave to renew his motion upon such additional papers as he may be advised (fol. 22, 28), thus distinctly throwing on him the burden of showing the non-existence of malice or willfulness in the injury, for the redress of which the judgment was rendered.

As we have seen, a judgment of this nature may involve the loss of services of the wife by the husband, and so may constitute an injury to property through the loss of such services. It was therefore also incumbent upon the plaintiff in error to establish the fact that the judgment did not involve in it the element of compensation given for the loss of the services of the wife.

Indeed, it is stated to be the settled rule as to the sufficiency of evidence that a particular debt or judgment is released by discharge in bankruptcy, that the nature of the action in which the judgment is rendered is determined by the record, and, therefore, when it is necessary to consider whether the judgment is released by a discharge in bankruptcy, the fact must be determined by the record and not by any allegation or proof outside of it.

Burnham vs. Pidcock, 58 App. Div. (N. Y.), 276.
Hargadine, McKittridge D. G. Co. vs. Hudson *et al.*, 111 Fed., 261.
In re Bullis, 7 Am. Br., 238.
Turner vs. Turner, 108 Fed., 785.

It has been heretofore asserted, however, on behalf of the plaintiff in error that the mere showing by him of the fact of his discharge in bankruptcy and of the fact of the existence of this judgment against him is sufficient to entitle him to a cancellation of the judgment in this proceeding, and that the burden is upon the defendant in error to show that this judgment comes within one of the classes which, by subdivision 2 of section 17 of the Bankruptcy Law, is exempted from the effect of a discharge in bankruptcy. He

bases this contention upon the highly technical proposition advanced by him to the effect that, when the enacting clause or purview of a statute is general, the exceptions to it must be strictly construed, and that it rests with the respondent to show that the judgment falls within some of the exceptions.

We do not understand such to be the law, and we maintain that the so-called exceptions in this statute which this Court is here called upon to construe are not necessarily exceptions, but words in the enacting clause itself, descriptive of the class of debts from which a bankrupt is not released by the operation of a discharge.

While counsel for plaintiff in error may correctly state the rule with respect to a *proviso*, he does not correctly state it with respect to an *exception* found in the general enacting clause in the provisions of a statute.

The difference between an exception and a proviso in a statute is that the first exempts absolutely from the operation of the enactment, whereas the latter only defeats the operation of the enactment conditionally. As stated in Bouvier's Law Dictionary,

> "An exception exempts absolutely from the operation of an engagement of an enactment; a proviso defeats their operation conditionally. An exception takes out of an engagement or enactment something which would otherwise be part of the subject matter of it; a proviso avoids them by way of defeasance or excuse."

As was said in Rowley vs. Janvrin, 151 N. Y., 68:

> "An exception is, generally, *part of the enactment itself*, absolutely excluding from its operation some subject or thing that otherwise would fall within its scope."

Section 17*a* of the Bankruptcy Law, which is now before this Court for construction, reads:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * are judgments in actions * * * for willful and malicious injuries to the person or property of another."

Here we find the exception in the very body of the enacting clause and in the very sentence which provides for the release of a bankrupt from all of his provable debts. Certainly, it may not be said that the exception is not found in the enacting clause itself.

As was said in the case of Rowley vs. Janvrin, *supra*:

"In stating a cause of action arising upon a statute, it is an ancient rule that where an exception is incorporated in the body of the clause of a statute, *he who pleads the clause ought to plead the exception.*"

There is a technical distinction between a proviso and an exception. If there be an exception in the enacting clause of a statute, it must be negatived in pleading by the party claiming the benefit of the general enacting clause, but if there be a seperate proviso which is afterwards introduced, that need not necessarily be negatived.

Spiers vs. Parker, 1 T. R., 141; 1 Barn. & Adl., 199.
Thiebault vs. Gibson, 12 Meeson & Welshy, 88, 740.
Rowell vs. Janvrin, 151 N. Y., 60.

The case of Spiers vs. Parker, *supra*, illustrates this distinction very clearly. There the provision of the statute was that no person should be liable to be impressed or taken from certain colonies, unless he were a marine, who had deserted from a ship of war belonging to His Majesty, the King of Great Britain, and an action was brought by the plaintiff to recover a penalty granted by the statute upon the ground that he had been wrongfully impressed.

Lord MANSFIELD said:

> "The pleader who drew this declaration was clearly of opinion that it was necessary, for he has negatived what he thought to be the exception, and he was right; for it is a settled distinction between a proviso in the description of the offense and a subsequent exemption from the penalty under certain circumstances. If the former, the plaintiff must, as in actions upon the game laws, aver a case which brings the defendant within the act; therefore, he must negative the exceptions in the enacting clause."

And in Simpson vs. Ready, 12 M. & W., 736, 740, ALDERSON, B., said:

> "There is a manifest distinction between a proviso and an exception. If the exception occurs in a description of the offense in the statute, the exception must be negatived or the party will not be brought within the description. But if the exception comes by way of proviso, and does not alter the offense, but merely states what persons are to take advantage of it, then the defense must be specially pleaded, or may be given in evidence under the general issue, according to circumstances."

Here the exception in this statute, of which plaintiff in error seeks the benefit, is plainly in the enacting clause. It is contained in the very sentence which releases the bankrupt from all of his provable debts. Hence, it was absolutely necessary for the plaintiff in error to negative the fact that the judgment here sought to be canceled was not in an action for willful and malicious injuries to the person or property of the judgment creditor.

POINT IV.

The nature of the judgment here involved.

In re Cotton, 6 Fed. Cas., 3269, the learned Court, summarizing the various interpretations of bankruptcy laws, similar to subdivision 2 of the section of the bankruptcy act now in question, as applied to attempts to discharge judgments for seduction and accrued alimony, all of which have been denied :

> " In all these cases it is held that the payments provided for the judgments and decrees are of *penalties or fines imposed for wrongful or criminal acts*, or to enforce a moral or natural duty, rather tha ı of the nature of debts."

The judgment involved in this proceeding was entered on a verdict rendered by a jury for $50,000 damages for the criminal conversation of *Dr. Charles A. Tinker* with the wife of said *Frederick L. Colwell.*

It is needless to call attention to the proof essential to establish such a cause of action or to cite authorities as to the elements of the damages awarded when such a cause of action exists.

The law, well known to this Honorable Court, is well summarized in the following extracts from the learned trial Justice, Mr. Justice BISCHOFF, delivered to the jury which rendered the verdict against the alleged bankrupt in favor of said Colwell, the learned Court, among other things, said :

> " If the plaintiff has proven his allegations, that the defendant did, indeed, debauch the plaintiff's wife, and this without the plaintiff's connivance or assent, his right to your verdict would be apparent, and he would be entitled to damages, *not only as reasonable compensation for the injury, but*

also to an amount such as you find should be imposed upon the defendant to pay as a just and proper punishment, for his act, in view of all the circumstances of the case, *such an act being abhorrent to the law, and an award of exemplary or punitive damages being authorized and fitting as an example deterrent upon the commission of such offenses by the defendant and others in the future.*"

Johnston vs. Disbrow, 47 Mich., 59.
Johnson vs. Allen, 100 N. C., 131.
Cornelius vs. Hamberg, 150 Pa. St., 359.

And again, the learned trial Justice charged the jury as follows:

"*The other element of damage*—that of a punitive nature—does not depend upon compensation to the plaintiff, *but rests upon the principle that for a malicious and reprehensible act the defendant may well be punished, and the law's condemnation of the fault be given voice.* The wrongdoing of the defendant is here the test of what the award should be, and the circumstances surrounding this wrongdoing are to be viewed as of great importance in determining the character and severity of the fault.

"You are to consider, on the one hand, the means of which the defendant gained access to the plaintiff's house, and the facilities, with the attendant duty of good faith, which he had to maintain close relations with the plaintiff's wife.

"It is admitted that for several years he was the trusted family physician of the plaintiff's household, in a position whereby he was accorded, necessarily, the greatest trust with regard to the persons of those in the plaintiff's family. Especially in the case of the wife was this trust displayed. He delivered her of children and her person was in his hands, not as a man, but as a physician exercising one of the most important duties of his calling, and, from the nature of the relation which existed, facilities were given him of

private meetings with the wife, such as no man other than her husband rightfully possessed.

"If this privileged relation was employed by him to accomplish unworthy desires to satisfy his lust through wanton diregard of the trust reposed in him, and the misery which a breach of that trust would inflict upon others, no condemnation of the fault can be too severe ; but it is for you to say whether the circumstances were sueh that extreme denunciation would be just."

The jury awarded a verdict for $50,000 punitive damages "as an example deterrent upon the commission of such offenses by the defendant and others in the future."

This judgment then falls directly under the ruling in the cases above cited, "the payment provided for by the judgment being of a penalty for a wrongful act," and as the object of the statute is to discourage and punish such moral turpitude and intentional wrong," the Court will not permit the very object of the act to be thwarted in this instance.

The punitive damages awarded by this judgment, in the words of the trial Justice above quoted, "rest upon the principle that for a *malicious and reprehensible* act the defendant 'was' punished and the law's condemnation of the fault 'was' given voice.

Not all judgments or decrees against a bankrupt for the payment of money evidence debts provable against his estate, under Bankr. Act 1898, Sec. 63*a*, cl. 1, and in determining their character, the Court will look beyond the form of the judgment and consider the nature of the liability upon the original cause of action.

Turner vs. Turner, 108 Fed. Rep., 785.

Notwithstanding the change in form from that of a simple debt or duty by merger into a judgment of a court of record, it still remains the same debt or duty in which the action was first brought.

Boynton vs. Ball, 121 U. S., 457-466.

POINT V.

"The purpose of the Bankruptcy Act was to relieve failing honest debtors from their money obligations, and not to free tortious debtors from liability for their wrongs."

This is the very language used by Mr. Justice DICKEY in refusing to discharge a judgment recovered in an action for breach of promise and seduction.

Desler vs. McCauley, 35 Misc. (N. Y.), 411.

Mr. Justice BAKER, District Judge in Turner vs. Turner, 108 Fed. Rep., 785, says:

> "The object of the bankruptcy act was to relieve the honest and unfortunate debtor from the burden of his debts."

Criminal intercourse with another's wife is an *intentional* wrong, and such wrongs are always *malicious* acts, and in many of the States the subject of indictment under the criminal law.

It is almost incredible to imagine that the framers of the Bankruptcy Act intended to consider such wrongs a mere merchantable debt, after the damages have been assessed by a jury, and that the injured husband was to take his *pro rata* with ordinary creditors.

This seems to put a price upon every man's wife, with the assurance that when the extent of the injury has been determined the Federal Congress, by its enactment, makes the injured husband a contract creditor. Can such a principle be judicially declared by any Court? It is bad enough to suggest it, and then the suggestion ought to have a prompt quietus.

> "The offense charged is a most grievous wrong against social order and society; it strikes at the

foundation of the home and the legitimacy of offspring."

Mr. Justice BARTLETT in his opinion, at folio 37.

POINT VI.

The United States District Court for the Southern District of New York was without jurisdiction to grant the discharge of the plaintiff in error and the said discharge is null and void.

The judgment of Frederick L. Colwell against Dr. Charles A. Tinker was not a dischargeable debt and it was only debt set forth in the petition of the bankrupt (fols. 5 and 6). There being no dischargeable debts shown, there was nothing for the Court to discharge and it was, in consequence, without jurisdiction. The question of jurisdiction was raised by the defendant in error by his specifications of objections in the said United States District Court for the Southern District of New York. Mr. Justice KNOWLES, District Judge, *in re* Maples, 105 Fed., 919, amony other things, says in his opinion :

> " I reach the conclusion, then, that the judgment in this case is for a willful and malicious personal injury, and that it cannot be discharged under the bankruptcy act. The bankrupt, in *his petition*, therefore, has not presented any debt or claim from which this Court can discharge him. In some of the cases cited by the bankrupt's counsel, it was claimed that the discharge might operate on claims that were not scheduled. This may be true. And yet, upon a mere supposition that

possibly there might be such claims, should a Court be called upon to act and render its judgment? In regard to the federal courts, it is generally said that their jurisdiction is not general, but special, *and the grounds for exercising such jurisdiction must appear in the record.* There should always be a subject matter upon which any court can act. It ought not to be called upon to act upon a mere supposition that there might be somebody or something affected by its judgment. * * * Certainly a debt which the action of the court could not affect ought not to give jurisdiction."

This latter decision is directly in conflict with the decision of Judge BROWN in Colwell vs. Tinker, reported in 99 Fed., p. 79. Extracts from the opinion of Mr. Justice BROWN, relating to the question of jurisdiction, are quoted as follows:

"An adjudication of the above bankrupt was made September 13th, 1899, the only debt scheduled being a judgment against him for $50,653.98 damages and costs, recovered in the supreme court of this state in an action of crim con.

"On the return of the day of the application for discharge, the judgment creditor has objected (1) that the judgment is willful and malicious injury to the person or property of another and therefore will not be released by a discharge; (2) that this being the only debt scheduled, there are no debts to be discharged, and that the court therefore has no jurisdiction to grant any discharge. * * * The ordinary course of procedure in adjudging discharges, *where the court has jurisdiction of the petition,* is to grant the application, if the bankrupt is otherwise entitled to the discharge, without determining in any way its effect in releasing any particular debt, and that course should, I think, be pursued here.

"There may be other debts of the bankrupt owing to creditors, who though not named in the schedules, yet by reason of their actual knowledge of these proceedings would be barred by the discharge, even though the judgment scheduled should not be released by it.

"It cannot be said, therefore, that in the latter case the discharge would be of no possible use, or that the court has no jurisdiction to grant it. On the other hand, if not granted, its force and effect could not be adjudicated in the ordinary way by being set up as a bar to any further proceedings upon the judgment; while granting of *the discharge in this proceeding would not necessarily be res adjudicata as respects its effect as a release from this judgment. The discharge should, therefore, be granted, without any attempt at a final determination of its effect upon the judgment.*"

It is respectfully submitted that the law is correctly stated in the opinion of Mr. Justice KNOWLES.

POINT VII.

The writ of error herein should be dismissed and the order of the New York Supreme Court entered upon the determination of the Court of Appeals of the State of New York, affirmed.

Respectfully submitted,
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